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No. 07-946

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CALPERS)

Petitioner,

v.

NEW YORK STOCK EXCHANGE, INC.,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 19, 2008

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QUESTION PRESENTED

Did the Second Circuit properly hold, as other circuit courts have held, that there is no "bad faith" or "deliberate inaction" exception to the well-established principle that self-regulatory organizations are absolutely immune from private claims arising from the allegedly improper exercise of the regulatory authority delegated to them under the Securities Exchange Act of 1934?

PARTIES TO THE PROCEEDING

Petitioner, California Public Employees' Retirement System ("CalPERS"), is a court-appointed lead plaintiff in a putative securities class action against Respondent New York Stock Exchange, Inc. (the "NYSE") and several other defendants (the "Specialist Firms") that are not before the Court on this Petition; as of the date hereof, the putative class has not been certified.

Petitioner mischaracterizes the relationship between the NYSE and the Specialist Firms by suggesting that the NYSE owns, or has some other proprietary interest in, the Specialist Firms. *See, e.g.*, Petition at ii, 3 (referring to the NYSE and "its" Specialist Firms and "the NYSE's Specialists"). The Consolidated and Amended Complaint ("Complaint") makes no such allegation, and the NYSE does not own (and has never owned), directly or indirectly, any of the Specialist Firms.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent, at all times relevant to the allegations in the Complaint, was a New York not-for-profit corporation with no public shareholders. Pursuant to a 2006 merger between the NYSE and Archipelago Holdings, Inc., the NYSE's status as a self-regulatory organization and national securities exchange was transferred to New York Stock Exchange LLC, a limited liability corporation and wholly owned subsidiary of a publicly held successor entity, NYSE Group, Inc. ("Group"). In 2007, Group combined with Euronext N.V. to become NYSE Euronext, a publicly held corporation and the world's

largest exchange group. As of the date hereof, no publicly held corporation owns 10% or more of the stock of NYSE Euronext.

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BRIEF OF RESPONDENT NEW YORK STOCK EXCHANGE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent New York Stock Exchange, Inc. (the "NYSE") respectfully requests that this Court deny the petition for a writ of certiorari ("Petition," cited herein as "Pet.") filed by the California Public Employees' Retirement System ("Petitioner").

STATEMENT OF THE CASE

This case concerns an attempt to circumvent the well-established principle that self-regulatory organizations ("SROs"), such as the NYSE, are entitled to absolute immunity from private claims arising out of their allegedly improper or inadequate regulation of their members' conduct on the national securities exchanges. Petitioner contends that the NYSE is not entitled to absolute immunity because the NYSE's alleged failure to conduct adequate surveillance, investigation, and discipline of seven "Specialist Firms" for improper proprietary trading was deliberate. The Second Circuit properly held that the NYSE is entitled to absolute immunity with respect to Petitioner's claims because they arise from the NYSE's exercise of discretion with respect to the quasi-governmental regulatory authority delegated to the NYSE by Congress under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. ("Exchange Act"). *See* Petitioner's Appendix ("Pet. App.") at 21a-22a. In doing so, the Second Circuit expressly rejected Petitioner's argument that absolute SRO immunity does not apply to allegations of deliberate regulatory misconduct or inaction. *Id.* at 24a-26a.

As Petitioner tacitly acknowledges, the Second Circuit's decision is completely consistent with the decision of every other circuit court that has ruled on the question of absolute SRO immunity; each of these decisions rejects the assertion of a bad faith or fraud "exception" to the immunity doctrine. *See DL Capital Group, LLC v. NASDAQ Stock Market, Inc.*, 409 F.3d 93 (2d Cir. 2005); *D'Alessio v. NYSE, Inc.*, 258 F.3d 93 (2d Cir.), *cert. denied*, 534 U.S. 1066 (2001); *P'ship Exch. Sec. Co. v. NASD, Inc.*, 169 F.3d 606 (9th Cir. 1999); *Sparta Surgical Corp. v. NASD, Inc.*, 159 F.3d 1209 (9th Cir. 1998); *Barbara v. NYSE, Inc.*, 99 F.3d 49 (2d Cir. 1996); *Austin Mun. Sec., Inc. v. NASD, Inc.*, 757 F.2d 676 (5th Cir. 1985); *see also Weissman v. NASD, Inc.*, 500 F.3d 1293 (11th Cir. 2007) (en banc); *MFS Sec. Corp. v. NYSE, Inc.*, 277 F.3d 613 (2d Cir.), *cert. denied*, 536 U.S. 924 (2002). The Second Circuit's decision is likewise consistent with prior Second Circuit decisions that SROs are not "state actors" for purposes of determining whether individuals subject to their regulatory jurisdiction may assert claims against them for deprivations of constitutional rights. *See, e.g., United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975).

Finally, there is no inconsistency between the Second Circuit's holding that the NYSE is absolutely immune from Petitioner's claims and any of this Court's precedents. The precedents cited by Petitioner in an attempt to create the appearance of such a conflict involve alleged constitutional violations by *individuals* employed by the government or performing quasi-governmental functions; as such, they do not conflict with or undermine the absolute immunity of the NYSE,

which mirrors the immunity of the SEC in connection with the performance of its own regulatory duties.

Factual Background

The Parties. Petitioner, the public employee retirement system for the State of California, purports to bring a class action lawsuit on behalf of millions of unidentified public investors who bought or sold unidentified securities on the NYSE trading floor from October 17, 1998 through October 15, 2003 ("Relevant Period"). The district court appointed Petitioner lead plaintiff, along with Empire Programs, Inc. (which subsequently withdrew as co-lead plaintiff). As of the date hereof, the district court has not ruled on Petitioner's pending motion for class certification, which has been opposed by the Specialist Firms.

The NYSE, at all times relevant to the allegations in the Amended and Consolidated Complaint ("Complaint"), was a New York not-for-profit corporation registered with the Securities and Exchange Commission ("SEC") as a national securities exchange in accordance with Section 6 of the Exchange Act, 15 U.S.C. § 78f.[1] The NYSE, therefore, acted as an SRO within the meaning of the Exchange Act. 15 U.S.C. § 78c(a)(26).

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[1] More than two years after the close of the alleged class period, the NYSE's status as a national securities exchange under the Exchange Act was transferred to New York Stock Exchange LLC, now an indirect subsidiary of NYSE Euronext, a publicly held corporation.

The Exchange Act establishes a scheme of regulation of the securities marketplace that combines self-regulation by the securities exchanges with oversight and direct regulation by government agencies (in this case the SEC). *See* S. Rep. No. 94-75, at 23, *as reprinted in* 1975 U.S.C.C.A.N. 179, 201-02. Section 19(g)(1) delegates regulatory authority to the NYSE and to other SROs, providing, in pertinent part, that "every self-regulatory organization shall comply with the provisions of [the Exchange Act], the rules and regulations thereunder, and its own rules, and ... enforce compliance ... with such provisions by its members and persons associated with its members ...." 15 U.S.C. § 78s(g)(1). The Exchange Act, in turn, provides the SEC with broad and exclusive authority to oversee (i) the NYSE's compliance with the Exchange Act, the rules and regulations thereunder, and its own rules and (ii) the NYSE's enforcement of its members' compliance with those provisions. 15 U.S.C. §§ 78s(g)(1) & (h)(1).[2] The Exchange Act empowers the SEC to take adverse action against the NYSE should it fail to fulfill these duties, including censure, suspension, or revocation of its status as an SRO, and the imposition of penalties. *Id.* The Exchange Act provides no express private

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[2] *See* Pub. L. No. 94-29, 89 Stat. 155 (1975). "The legislative history of the 1975 amendments underscored that self-regulatory organizations 'are intended to be subject to the SEC's control and have no governmentally derived authority to act independently of SEC oversight.'" *Sparta Surgical Corp. v. NASD, Inc.*, 159 F.3d 1209, 1214 (9th Cir. 1998) (quoting H.R. Rep. No. 94-123, at 48-49 (1975)).

right of action against SROs for alleged regulatory failures.

The Complaint's Factual Allegations.[3] The Complaint principally concerns alleged misconduct by the seven so-called "Specialist Firms" operating on the NYSE's trading floor during the Relevant Period. The Specialist Firms are independently owned member organizations of the NYSE; as such, they are subject to regulation by the NYSE as well as the SEC. Pet. App. at 4a-5a; JA2:85-88 (Compl. ¶ 19).

The NYSE itself does not execute trades. Pet. App. at 5a. Rather, it provides a trading facility for its members, including the Specialist Firms, and regulates its members pursuant to the authority delegated to it by the Exchange Act. *Id.* During the Relevant Period, each of the approximately 2,800 securities then listed for trading on the NYSE was assigned to one of the seven Specialist Firms, with each Specialist Firm conducting an auction market for the respective securities assigned to it. *Id.* at 5a-6a. To execute purchases or sales of a particular security, buyers and sellers presented bids (either electronically or through a broker) to the Specialist Firm assigned to that security. *Id.* When acting as agent for investors, the Specialist Firms were obligated to match executable orders to buy and sell in a timely manner at the best possible price. *Id.*

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[3] The NYSE refers here to the alleged facts as recited in the district court and Second Circuit opinions and, where appropriate, to the Complaint itself, which appears in the Second Circuit Joint Appendix at Tab 2 and is cited as "JA2:__ (Compl. ¶¶ __)."

Throughout the Relevant Period, the Specialist Firms were not permitted to act as a principal on one side of a securities transaction except in certain enumerated circumstances. *Id.* at 7a, *citing* NYSE Rule 104 (prohibiting a specialist from trading for its own account "unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market"). For example, if there were no matching public orders to sell and orders to buy, the specialist was permitted to execute an order to buy by selling stock from the specialist's proprietary account; conversely, a specialist was permitted to execute an unmatched order to sell by buying the investor's stock for the specialist's proprietary account. *Id.* at 6a-7a.

The Complaint alleges that, throughout the Relevant Period, the Specialist Firms failed to match executable public orders to buy and sell against each other and, instead, traded for their own accounts in circumstances not permitted by the rules. In particular, the Complaint alleges that the Specialist Firms engaged in (i) "interpositioning," described as "taking advantage of the spread between the bid and offer prices by buying stock from one public investor, and then selling it to another, locking in a guaranteed riskless profit," and (ii) "trading ahead," or filling an order from the Specialist Firm's inventory ahead of orders received from customers. *See id.* at 8a; JA2:109-14 (Compl. ¶¶ 76-90).

The Complaint, in turn, faults the NYSE for not properly regulating the Specialist Firms. The Complaint charges, *inter alia*, that the NYSE:

- "deliberate[ly] fail[ed] to properly oversee, regulate or supervise its securities

exchange or discipline its member Specialist Firms for their blatant violations," JA2:72-73 (Comp. ¶ 5); *see also id.* at 74-77, 199-201 (Compl. ¶¶ 8, 230-32);

- "conduct[ed] its regulatory activities and [took] disciplinary action" against the Specialist Firms in a "deliberately constrained and contracted manner ... to give the public illusion of meaningful oversight," *id.* at 183 (Compl. ¶ 193); and
- "routinely failed to act when it knew or had reason to know of improper conduct by its member firms. When NYSE's regulatory unit did act, it failed to compel any meaningful compliance ... by issuing small fines or letters," *id.* at 181 (Compl. ¶ 188).

While the Petition argues that the NYSE "actively engaged with [the] Specialist Firms in wide-ranging manipulative, self-dealing and misleading conduct," Pet. at 6, the Complaint is devoid of any allegation that the NYSE executed or directed the execution of any improper proprietary trades by the Specialist Firms. Instead, the only means of "active participation" alleged in the Complaint is the NYSE's supposed intentional failure to exercise its regulatory authority to "halt, expose or discipline" the Specialist Firms' misconduct "to the extent necessary to deter, stop or prevent" the misconduct. JA2:72 (Compl. ¶ 5). The Complaint alleges that these purported regulatory failures constitute violations of Sections 6(b), 10(b), and 20(a) of the Exchange Act. *Id.* at 202-09 (Compl. ¶¶ 234-60). The Complaint also asserts a state-law claim against the NYSE for "aiding and abetting a

breach of fiduciary duty" by the Specialist Firms. *Id.* at 210-11 (Compl. ¶¶ 261-65).

The Complaint makes extensive reference to a *Wall Street Journal* article dated November 3, 2003, which reports that the SEC had commenced an examination of the NYSE's regulation of the Specialist Firms, *id* at 73-77 (Compl. ¶¶ 7-8), but acknowledges that the examination began *after* the SEC learned earlier in 2003 that the NYSE was conducting its own investigation into improper trading by some of the Specialist Firms. JA:73 (Compl. ¶ 7). The Complaint also makes repeated references to the joint investigation conducted by the SEC and the NYSE into the Specialist Firms' improper trading and the Specialist Firms' subsequent settlements with both the SEC and the NYSE for violations of Section 10(b) of the Exchange Act and NYSE rules. *Id.* at 77-79 (Compl. ¶¶ 10-11).[4] As a result of these settlements, the Specialist Firms agreed to pay more than $245 million in disgorgement and penalties and to the establishment of a restitution fund for injured public investors. *Id.*

Additionally, the Petition refers to a settlement between the SEC and the NYSE which occurred after the filing of the Complaint. Pet. at 8-10. The NYSE, without admitting or denying the SEC's findings, agreed to entry of an order imposing a censure and requiring the NYSE to cease and desist from future violations of the securities laws. Pet.

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[4] The full text of the SEC's press releases announcing the settlements with the Specialist Firms, which reference the joint nature of the investigation, is available on the SEC's website. *See, e.g.*, http://www.sec.gov/news/press/2004-42.htm.

App. at 140a.[5] The NYSE also agreed to take certain remedial measures in addition to those already adopted. *Id.* In particular, the SEC criticized the NYSE's (i) specialist surveillance for having parameters inadequate to detect all instances of trading ahead or interpositioning, (ii) investigatory procedures for being insufficiently rigorous, and (iii) discipline of Specialist Firms found to have engaged in improper trading. *Id.* at 142a.

The SEC did not charge the NYSE with violations of Section 10(b), nor did it allege that the NYSE had aided and abetted the Specialist Firms' violations of Section 10(b). Pet. App. at 140a-44a.[6] Instead, the SEC charged the NYSE with the failure to comply with Section 19(g) of the Exchange Act, 15 U.S.C. § 78s(g), because it "failed to *adequately* monitor and police specialist trading activity...." Pet. App. at 141 (emphasis supplied). In doing so, the SEC exercised its exclusive authority under the Exchange Act, 15 U.S.C. §§ 78s(g)(1) & (h)(1), to oversee and review the NYSE's regulatory performance.

Procedural History

After the filing of the Complaint on September 16, 2004, the NYSE moved to dismiss on the basis of

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[5] The Petition cites only to the SEC's press release announcing the settlement with the NYSE. Pet. at 10. The SEC order is publicly available on the Internet at http://www.sec.gov/litigation/admin/34-51524.pdf.

[6] Although private litigants may not bring a claim for aiding and abetting a federal securities violation, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), the SEC is authorized to bring aiding and abetting claims. *See* 15 U.S.C. § 78t(e).

absolute SRO immunity, as well as several other grounds.[7] Notwithstanding controlling Second Circuit precedent to the contrary, Petitioner opposed the motion by arguing, among other things, that the NYSE's alleged regulatory failures were motivated by non-regulatory motives. Pet. App. at 70a-71a.

The district court rejected Petitioner's arguments and dismissed all of Petitioner's claims against the NYSE with prejudice.[8] Pet. App. at 67a, 138a-39a. In relevant part, the district court determined that the NYSE's alleged "failure to adequately monitor the conduct of the Specialist Defendants" was subject to absolute immunity because it "falls within the scope of its quasi-governmental authority." *Id.* at 71a.[9]

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[7] The Specialist Firms moved separately to dismiss the allegations against them. Those motions were granted in part and denied in part. Pet. App. at 75a-106a.

[8] Petitioner incorrectly states that "[m]ost claims" were dismissed with prejudice by the district court. Pet. at 3.

[9] With respect to the Complaint's allegations that the NYSE made misstatements concerning its rules, its regulatory conduct, and the operation of the auction market in various public materials, the district court held that plaintiffs lacked standing under Section 10(b) to pursue such claims because the alleged misstatements did not concern any of the issuers of the securities traded by plaintiffs. Pet. App. at 72a-75a.

The district court did not reach the other grounds for dismissing Petitioner's claims of regulatory failure, including (among others) that: (i) Petitioner has no private right of action against the NYSE under Section 6(b) of the Exchange Act, *see, e.g., MM&S Fin., Inc. v. NASD, Inc.*, 364 F.3d 908, 910-11 (8th Cir. 2004), and (ii) Petitioner's claim that the NYSE's alleged regulatory failures constitute "manipulation" under Section 10(b) is foreclosed by this Court's decision in

On appeal to the Second Circuit, Petitioner argued that the controlling Second Circuit precedent, which holds that allegations of bad faith or fraudulent intent do not defeat an SRO's entitlement to absolute immunity, was inapplicable "where the NYSE does not act and has essentially, in [plaintiffs'] words, 'abandoned' its duty to regulate." Pet. App. at 16a.[10] In short, Petitioner argued that bad faith regulatory inaction — unlike affirmative regulatory action allegedly taken in bad faith — is inconsistent with, and therefore outside, the scope of the NYSE's regulatory authority.

A unanimous Second Circuit panel affirmed the district court's finding of absolute immunity, relying on its settled, uniform precedent: "The common thread in these cases is that absolute immunity attaches where the activity 'relate[s] to the proper functioning of the regulatory system'.... Thus, so long as the 'alleged misconduct falls within the scope

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[Footnote continued from previous page]

Central Bank of Denver, 511 U.S. 164, where the Court ruled that there was no private right of action for aiding and abetting violations of Section 10(b). *See also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* 128 S. Ct. 761 (2008) (rejecting theory of scheme liability). In addition, the Complaint fails to plead loss causation, *see Dura Pharm, Inc. v. Broudo*, 544 U.S. 336 (2005), and other requisite elements of a securities fraud claim, including reliance and scienter.

[10] Notwithstanding Petitioner's "abandonment" argument, the Complaint explicitly alleges that the NYSE took affirmative action to monitor and regulate the Specialist Firms' proprietary trading. *See, e.g.*, JA2:73 (Compl. ¶ 7), 135 (Compl. ¶ 129), 140 (Compl. ¶ 130), 145 (Compl. ¶ 131), 150 (Compl. ¶ 133), 160 (Compl. ¶ 135), 183 (Compl. ¶ 193).

of the quasi-governmental powers delegated to the NYSE,' absolute immunity attaches." Pet. App. at 15a (quoting *D'Alessio*, 258 F.3d at 106) (alteration in original). The Second Circuit further noted that, "as in other absolute immunity contexts, we focus on the nature of the function performed, not the identity of the actor who performed it.'" *Id.* at 14a (quoting *Forrester v. White,* 484 U.S. 219, 229 (1988).

The court expressly rejected Petitioner's arguments that absolute immunity did not apply to claims arising from alleged regulatory inaction, Pet. App. at 16a-19a, or to claims arising from alleged fraud or bad faith, *id.* at 24a-26a, holding that the alleged acts and inactions did not "fall outside" the outer perimeter of the NYSE's regulatory authority. The court stated that "[i]t is clear that these claims all involve the *NYSE's action or inaction with respect to trading on the Exchange*, which is indisputably within the NYSE's regulatory powers." Pet. App. at 21a (emphasis supplied). The court further held that "immunity depends only on *whether* specific acts and forbearances were incident to the exercise of regulatory power, and not on the propriety of those actions or inactions." *Id.* at 19a (emphasis in original).[11]

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[11] Not relevant for purposes of the Petition, the Second Circuit vacated that part of the district court's judgment that held that Petitioner and other members of the putative class lacked standing to pursue a Section 10(b) claim against the NYSE for its alleged misstatements; the Second Circuit remanded the misrepresentation claim to the district court and invited the NYSE to renew its motion to dismiss these claims on grounds not previously reached by the district court,

REASONS FOR DENYING THE PETITION

No reason, compelling or otherwise, supports granting the Petition in this case. *See* Sup. Ct. R. 10.[12] The Second Circuit decision does not conflict with any decision of the Second Circuit or of any other Court of Appeals decision concerning absolute SRO immunity — a point implicitly conceded by Petitioner. Finally, the Petition provides the Court with no reason to "clarify" the scope of SRO immunity from claims of alleged regulatory failure by its citation of this Court's decisions concerning the scope of immunity afforded to individual government officials sued for alleged violations of constitutional rights. To the extent that comparisons with cases involving individual officials' immunity is instructive, the Second Circuit's decision is completely consistent with this Court's precedents holding government officials absolutely immune from non-constitutional claims arising from the exercise of discretion within the outer perimeter of their official authority.

[Footnote continued from previous page]

including Petitioner's failure to adequately plead loss causation and reliance. *See* Pet. App. at 26a-29a.

[12] This is not the first time this Court has been asked to review a Second Circuit decision holding the NYSE absolutely immune from claims arising from the allegedly improper and inadequate exercise of its delegated regulatory authority. *See D'Alessio v. NYSE, Inc.*, 258 F.3d 93, 105 (2d Cir.), *cert. denied*, 534 U.S. 1066 (2001).

I. THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION AND ANY OTHER CIRCUIT COURT DECISION

There is no conflict between or within any of the Courts of Appeals for this Court to resolve. Every circuit court that has considered whether an SRO enjoys absolute immunity from suit when exercising its regulatory authority under the Exchange Act has held the SRO to be absolutely immune. *See, e.g., DL Capital Group*, 409 F.3d at 97 ("There is no question that an SRO and its officers are entitled to absolute immunity when they are, in effect, 'acting under the aegis' of their regulatory duties.") (citation omitted); *MFS Sec. Corp.*, 277 F.3d at 617 ("NYSE is immune from liability for claims arising out of the discharge of its duties under the Exchange Act.") (quotation marks and citation omitted); *D'Alessio*, 258 F.3d at 105 ("The NYSE, as a SRO, stands in the shoes of the SEC in interpreting the securities laws for its members and in monitoring compliance with those laws. It follows that the NYSE should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority."); *P'ship Exch. Sec. Co.*, 169 F.3d at 608 ("[I]f the action is taken under the 'aegis of the Exchange Act's delegated authority,' the NASD is protected by absolute immunity from money damages[.]") (citation omitted); *Sparta Surgical Corp.*, 159 F.3d at 1213 ("Extending immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress."); *Barbara*, 99 F.3d at 59 ("We think that absolute immunity is particularly

appropriate in the unique context of the self-regulation of the national securities exchanges."); *Austin Mun. Sec., Inc.*, 757 F.2d at 692 (holding that "the NASD is entitled to absolute immunity for its role in disciplining its members and associates").[13]

Faced with this unanimity among applicable precedents, Petitioner lamely attempts to manufacture a "conflict" *within* the Second Circuit by pointing to *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975), a case holding that SROs are not "state actors" for purposes of alleged constitutional deprivations. Pet. App. at 15-17.[14] *Solomon*, however, is completely inapposite; in that case, the Second Circuit held that the NYSE's ability to suspend or sanction a member that fails to cooperate with an investigation by the NYSE into a violation of its rules does not make it a "state actor" or an "agent" of the government for purposes of violating a

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[13] *See also Weissman v. NASD, Inc.*, 500 F.3d 1293, 1296 (11th Cir. 2007) (en banc) ("Because they perform a variety of vital governmental functions, but lack the sovereign immunity that governmental agencies enjoy, SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions.").

[14] Notably, Petitioner did not argue in the district court that absolute SRO immunity is contrary to existing Second Circuit precedent. Similarly, Petitioner did not make this argument before the Second Circuit, nor did it seek rehearing or suggest rehearing *en banc* after the Second Circuit issued its ruling. These failures fatally undermine Petitioner's contention, Pet. at 15-16, that a purported intra-circuit conflict presents an important issue of federal law that should be settled by this Court. *See* Sup. Ct. R. 10(c).

member's Fifth Amendment right against self-incrimination. *Solomon,* 509 F.2d at 869.[15]

There is no inconsistency between the Second Circuit's holding in *Solomon* and its holding in this case that the NYSE may not be sued by Petitioner for alleged misuse of its regulatory authority. *See, e.g., D'Alessio v. NYSE, Inc.*, 125 F. Supp. 2d 656, 659 (S.D.N.Y. 2000) (rejecting argument that absolute SRO immunity is inconsistent with *Solomon*), *aff'd*, 258 F.3d 93 (2d Cir. 2001). The cooperative scheme of regulation established by Congress pursuant to the Exchange Act, in which the NYSE independently exercises regulatory authority subject to SEC oversight, did not give the NYSE the power to deprive a person of life or liberty as a result of his statements. *Solomon,* 509 F.2d at 867.

The only "authority" cited by Petitioner to support its contention — raised for the first time in this Court — that "clarification " is needed as to the scope of absolute SRO immunity is a single law journal article. Pet. at 15; *id.* at 17 (quoting William I. Friedman, *The Fourteenth Amendment's Public/Private Distinction Among Securities Regulators in the U.S. Marketplace — Revisited*, 23 Ann. Rev. Banking & Fin. L. 727 (2004)). However, the article's author does not challenge the entitlement of SROs to absolute immunity, 23 Ann. Rev. Banking & Fin. L. at 766 and, instead, merely urges judicial reconsideration of the principle that SROs are not state actors for purposes of alleged

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[15] *See also D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002).

deprivations of constitutional rights. *Id.* at 767. That question is not presented by the Petition.

II. PETITIONER FAILS TO MANUFACTURE A CONFLICT WITH THIS COURT'S PRECEDENTS

In the absence of any actual conflict within or between the lower courts, Petitioner attempts to create a conflict between the Second Circuit's decision and several different lines of this Court's precedent. Once again, Petitioner never raised any of these arguments below, and for good reason: they lack all merit.

A. Absolute Immunity Is Appropriate Regardless Of Allegations Of Fraud Or Inaction

Petitioner principally contends that absolute SRO immunity is inappropriate where a complaint alleges deliberate regulatory inaction by an SRO. Pet. at 5-10, 14, 26-30. In making this argument, Petitioner contends that the Second Circuit decision here is inconsistent with dicta in *Butz v. Economou*, 438 U.S. 478, 507 (1978), in which this Court noted that absolute immunity should be limited to "exceptional situations." Pet. at 26. Petitioner then baldly asserts that if suits against top-ranking presidential aides do not involve "exceptional situations," then claims against the NYSE likewise do not involve "exceptional situations." Pet. at 26-27. This argument is based on a false analogy.

1. *Butz* And Other Cases Involving Constitutional Claims Against Individual Officials Have No Application Here

Butz, and the other decisions of this Court cited by Petitioner to support the proposition that the NYSE's immunity does not apply to claims of deliberate misconduct, are inapposite for several reasons. First, each of these decisions concerns *individual* government officials sued for money damages arising from alleged violations of *constitutional* rights.[16] Such suits were directed at individual government officials because damage claims against the government or agencies that employed them were barred by sovereign immunity. By contrast, this case involves damages claims against the NYSE, a self-regulatory organization that "stands in the shoes of the SEC in interpreting the securities laws for its members and monitoring compliance with those laws." *D'Alessio*, 258 F.3d at 105. Because claims by investors arising out of alleged regulatory failures of the SEC would be barred by sovereign immunity, "[i]t follows that the NYSE should be entitled to the same immunity

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[16] *See, e.g., Butz v. Economou*, 438 U.S. 478 (1978) (federal hearing examiner and administrative law judge given absolute immunity from constitutional claims); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (Presidential aides given qualified immunity from constitutional claims); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (Attorney General given qualified immunity from constitutional claims); *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (members of prison disciplinary committee given qualified immunity from constitutional claims); *Wood v. Strickland*, 420 U.S. 308 (1978) (school board members given qualified immunity from constitutional claims).

enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority." *Id.*

Even if the NYSE could be analogized to an "individual" SEC official rather than the SEC itself, it would still be entitled to absolute immunity under *Barr v. Matteo*, 360 U.S. 564 (1959), because this case does not involve alleged constitutional violations. In *Barr*, this Court held that the defendant official was absolutely immune from an intentional tort claim because the official's conduct, while not specifically required by law, was within the "outer perimeter" of the official's discretionary authority. *Id.* at 575. This Court emphasized that the official's immunity was absolute despite the plaintiff's allegations of malicious intent. *Id.*

By contrast, in *Butz*, this Court held that certain defendants were entitled only to qualified immunity because constitutional violations had been alleged. *See* 438 U.S. at 507 (emphasizing that absolute immunity in cases of alleged constitutional violations was appropriate only in "exceptional circumstances").[17] In doing so, this Court expressly stated that providing only qualified immunity, rather than absolute immunity, in cases alleging constitutional violations did not disturb, and is fully consistent with, its prior holding in *Barr*. *Butz*, 438 U.S. at 506.

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[17] These "exceptional situations" included instances where the official charged with constitutional violations had been performing functions analogous to adjudicatory or prosecutorial functions. *Butz*, 438 U.S. at 508-17.

In short, neither *Butz* nor any of this Court's other precedents is inconsistent with the Second Circuit's holding that the NYSE is absolutely immune from the claims asserted by Petitioner.

2. Settled Law Rejects Petitioner's Proposed "Fraud" And "Inaction" Exceptions To The Absolute Immunity Doctrine

Further, this Court in *Barr* expressly rejected Petitioner's argument that the allegedly dishonest exercise of official authority is outside the bounds of that authority and, therefore, beyond the protections of absolute immunity. *Barr,* 360 U.S. at 572. The Court explained that the question of whether conduct is absolutely immune depends on "the relation of the act complained of to 'matters committed by law to [the official's] control or supervision,'" *id.*, at 573 (citations omitted), rather than the officials' subjective intent:

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine.

Barr, 360 U.S. at 572 (*quoting Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). Thus, "'it has been thought in the end better to leave unredressed the

wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" *Id.* at 571-72 (*quoting Gregoire*, 177 F.2d at 581).

Without absolute immunity, the NYSE's ability to monitor, investigate, and discipline its members for violations of NYSE rules and the federal securities laws would be seriously hindered because the NYSE — while subject to SEC oversight and guidance — must independently exercise discretion in determining how to perform its regulatory functions. Immunity promotes the sound exercise of discretion because it minimizes the risk that decisions will be made with an eye toward litigation and not the public good. *See, e.g., Barr*, 360 U.S. at 571 (explaining rationale for absolute immunity and noting, *inter alia*, that "the threat of [lawsuits] might appreciably inhibit the fearless, vigorous, and effective administration of policies of government"). Absolute SRO immunity is based on precisely the same principle. *D'Alessio*, 258 F.3d at 105 (absolute SRO immunity "is a matter not simply of logic but of intense practicality, since, in the absence of such immunity, the [NYSE's] exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits.") (alteration in original) (citation and quotation marks omitted).

This principle cannot be circumvented by the simple expedient of alleging an "unworthy purpose" on the part of those exercising such discretion. *Barr*, 360 U.S. at 575. *See DL Capital Group*, 409 F.3d at 99 ("It is, after all, hard to imagine the plaintiff (or plaintiff's counsel) who would — when otherwise wronged by an SRO but unable to seek money

damages — fail to concoct some claim of fraud in order to try and circumvent the absolute immunity doctrine."). Immunity would be of little value if it could be overcome by artful pleading. As this Court has recognized, immunity is more than a defense; it is an entitlement to freedom from the expense, inconvenience, and distraction of litigation. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (immunity defense is "meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery") (internal quotations omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

Petitioner's final attempt to create a bad faith exception to the NYSE's immunity from suit is its "abandonment" argument, which posits that even if bad faith action falls within the outer perimeter of the NYSE's regulatory authority, bad faith *inaction* falls beyond it. Pet. at 5-10, 14, 26-30. This is a distinction without a difference. As the Second Circuit made clear, "[t]he power to exercise regulatory authority necessarily includes the power to take no affirmative action." Pet. App. at 16a; *id.* at 19a ("the immunity depends only on *whether* specific acts and forbearances were incident to the exercise of regulatory power, and not on the propriety of those actions or inactions") (emphasis in original). The Second Circuit's holding is completely consistent with the protection afforded by *Barr* to the exercise of discretion in performing governmental functions. 360 U.S. at 570 (noting an official "may have legal authority to act, but ... may

have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested."). *See also Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 474 (1945) ("The authority to bring such suits includes the discretionary authority not to bring them, if the responsible officers of the government are of the opinion that a suit is not warranted or would be of disservice to the national interest.").

Finally, Petitioner argues that because "the SEC had to intervene to enforce the law — upbraiding the NYSE for *failure to act as a regulator*," this Court should conclude that "the NYSE was *not* in fact 'acting in its capacity as a SRO.'" Pet. at 28 (emphasis in original) (citation omitted). The exact opposite is true. The fact that the SEC exercised its oversight authority over the NYSE confirms that the NYSE's alleged failure to regulate the Specialist Firms involved its exercise of discretionary regulatory authority. Private actions challenging the NYSE's alleged regulatory inaction necessarily "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Barbara*, 99 F.3d at 59 (finding absolute immunity for the NYSE), just as much as suits alleging improper regulatory action.

Indeed, private suits against the NYSE for alleged regulatory failure would stand as an obstacle to the purposes and objectives of the Exchange Act even if the SEC had not taken action with respect to the NYSE's regulation of the Specialist Firms. The fact that the SEC has already taken such action serves only to undermine Petitioner's argument further.

B. There Is No Conflict With *Silver v. NYSE*

Petitioner also argues that this Court's decision in *Silver v. NYSE*, 373 U.S. 341 (1963), defeats the Second Circuit's finding of absolute SRO immunity. According to Petitioner, *Silver* permits the NYSE to be held liable "for exercising its self-regulatory powers in an arbitrary and unlawful fashion." Pet. at 18.

Silver — which Petitioner has never before cited in this litigation — is completely inapposite. The Court in that case addressed only the narrow question whether the Exchange Act impliedly repealed the federal antitrust laws in a suit by a non-member against the NYSE for alleged anti-competitive conduct. *Silver,* 373 U.S. at 342. This Court held in *Silver* that there was no implied repeal of the antitrust statutes as to the NYSE's allegedly anti-competitive actions because the SEC did not have the statutory authority to review or oversee those actions. *Id.* at 360 ("Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.").[18] The Court never addressed, let alone ruled on, the question of the NYSE's absolute immunity from suit

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[18] In *Gordon v. NYSE, Inc.*, 422 U.S. 659, 683 (1975), this Court explained and distinguished its prior decision in *Silver* by noting that in *Silver* "there was no implied repeal of the antitrust laws in that factual context because the Exchange Act did not provide for SEC jurisdiction or review of particular applications of rules enacted by the exchanges." By contrast, in *Gordon*, the SEC had direct authority to oversee the matters at issue. *Id.* at 688-89.

under the Exchange Act or common law when exercising its delegated authority to enforce its members' compliance with the federal securities laws and its own rules — a matter which, in contrast to the conduct at issue in *Silver,* has been the subject of extensive SEC review and oversight.

C. There Is No Conflict With *Richardson v. McKnight*

Inexplicably, Petitioner argues that the Second Circuit's decision conflicts with *Richardson v. McKnight*, 521 U.S. 399 (1997). Pet. at 20-25. In *Richardson*, the Court held that prison guards employed by a private contractor were not entitled even to qualified immunity from suits alleging constitutional violations under 42 U.S.C. § 1983. Although Petitioner's claims against the NYSE do not concern either privately contracted prison guards or alleged constitutional violations, Petitioner nonetheless contends that *Richardson* stands for the broad proposition that immunity "vanishes" when a private actor is involved. Pet. at 20. Not so.

In *Richardson,* this Court took pains to emphasize the narrowness of its holding. 521 U.S. at 413 ("[W]e have answered the immunity question narrowly, in the context in which it arose."). The Court stressed that "[t]he case does not involve a private individual ... serving as an adjunct to government in an essential governmental activity, *or acting under close supervision.*" *Id.* (emphasis supplied).[19] By contrast, the NYSE performs quasi-

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[19] Indeed, the Court's holding in *Richardson* was so narrow that the Court assumed, rather than decided, that the privately employed prison guards were even subject to liability under

governmental functions pursuant to extensive SEC oversight, and obtains its regulatory authority through an act of Congress rather than through a competitive bidding and contracting process. *Richardson* thus provides no support for Petitioner's suggestion that immunity "vanishes" due to the NYSE's status as a private entity.

CONCLUSION

The Second Circuit's decision is correct and fully consistent with other circuit law and the precedent of this Court. For all the above reasons, the NYSE respectfully requests that the Court deny the Petition.

Respectfully submitted,

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February 19, 2008

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Section 1983. *Richardson v. McKnight*, 521 U.S. 399, 413 (1997).